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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1849

ALFRED J. HEMLOCK,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinion Below	2
Jurisdiction	2
Statutory Provisions Involved	2
Questions Presented	2
Statement of the Case	4

REASONS FOR GRANTING THE WRIT:

1. The Court of Appeals has created a novel and unwarranted extension of the Federal hearsay exception relating to co-conspirators' declarations 8

2. The Court of Appeals has given an expanded reading of the "fictitious name" statute 18 U.S.C. § 1342, contrary to the rule that criminal statute must be read narrowly and literally 12

3. The Court of Appeals has raised a critical and unresolved question whether the "harmless error" doctrine applicable to errors of constitutional dimensions should also be applied to errors of non-constitutional dimensions 14

4. In reviewing the sufficiency of the Government's proof of guilt, the Court of Appeals has raised important questions as to the weight to be given to such proof and as to the jury's right to draw otherwise impermissible inferences therefrom, where the defendant has declined to take the stand or offer any independent evidence 17

PAGE

5. The Court of Appeals has applied the mail fraud statute, 18 U.S.C. § 1341, contrary to the standards established by this Court in *United States* v. *Maze*, 38 L.Ed. 2d 603 19

6. The Court of Appeals committed error and violated the principles of international comity in approving the introduction of testimony in a Federal trial in direct violation of a lawful order of a Bahamian court entered under a Bahamian bank secrecy statute 21

Conclusion 21

Appendix A 1a

Appendix B 35a

Appendix C 37a

Appendix D 40a

TABLE OF AUTHORITIES

Cases Cited

Bruton v. *United States*, 391 U.S. 123 12

Chapman v. *California*, 386 U.S. 18, 24 .....15, 19

Dutton v. *Evans*, 400 U.S. 74, 81 8

Frank v. *United States*, No. 73-1674 21

Grunewald v. *United States*, 353 U.S. 391, 399-402 .....8, 9, 11, 12

Kann v. *United States*, 323 U.S. 88, 95 .....20, 21

Kotteakos v. *United States*, 328 U.S. 750, 764-5 15

Krulewitch v. *United States*, 336 U.S. 440, 443-5..8, 9, 11, 12

PAGE

Langford v. *United States*, 178 F.2d 48 18

Milam v. *United States*, 322 F.2d 104, 107, 108 (5th Cir.) 11

Parr v. *United States*, 363 U.S. 370, 389-90 .....20, 21

Rowan v. *United States Post Office*, 397 U.S. 728, 740 14

United States v. *Bass*, 404 U.S. 336, 346-7 14

United States v. *Cardiff*, 344 U.S. 174, 176 14

United States v. *Chason*, 451 F.2d 301, 305, fn. 2 (2d Cir.) 16, 21

United States v. *Emmons*, 410 U.S. 396, 411 14

United States v. *Fantuzzi*, 463 F.2d 683, 690 (2nd Dept.) 11

United States v. *Maze*, 38 L.Ed. 2d 603 .....20, 21

United States v. *Semensohn*, 421 F.2d 1206, 1208 (2d Cir.) 16

Wong Sun v. *United States*, 371 U.S. 471, 490 8

Statutes Cited

28 U.S.C. §1254(1) 2

18 U.S.C. §§ 371, 1341, 1342, 1343 and 2314 ...2, 3, 4, 12, 13, 19, 28-30

Rule 29(a) of the Federal Rules of Criminal Procedure 18

Miscellaneous

David G. Trager, "Harmless Error" 16

A Doctrine for All Seasons 16

39 Brooklyn Law Rev. 1043 (1973) 16

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Petitioner Alfred J. Hemlock prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 25, 1974, which affirmed judgments of the United States District Court for the Southern District of New York, entered on a jury verdict, convicting petitioner and three co-defendants, John J. Frank, Harry Hoffer and Stephen Borgman, on various counts under the indictment herein. Petitioner's co-defendants are filing separate petitions for certiorari.[1]

[1] Borgman's petition is No. 73—1603, Frank's petition is No. 73—1674, and Hoffer's petition is being filed at the same time as this petition.

Petitioner is a member of the New York Bar. Notwithstanding a previously unblemished record, he was sentenced to a term of imprisonment of five years and fined $10,000.

Opinion Below

The opinion of the Court of Appeals, which is not yet reported, is printed in Appendix A, *infra*. No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on February 25, 1974 (Appendix B, *infra*). A timely petition filed by petitioner for rehearing and for rehearing *in banc* was denied by that court on April 11, 1974 (Appendix C, *infra*). By order made on April 30, 1974, Mr. Justice Thurgood Marshall extended petitioner's time for filing a petititon for a writ of certiorari herein to and including June 10, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The statutes here involved are 18 U.S.C. §§ 371, 1341, 1342, 1343 and 2314, which are set forth in Appendix D, *infra*.

Questions Presented

1. Whether the Federal hearsay exception limiting the admission of co-conspirators' declarations to those made in furtherance of an ongoing conspiracy, should be expanded to allow the admission of such declarations made long after the achievement of the central conspiratorial objectives, where:

(a) there was still a threat of civil suit by the victim against the conspirators and the declarations could be regarded as designed to mislead the victim and forestall any civil suit, or

(b) the declarations could be regarded as against the pecuniary interest of declarants unavailable to testify.

2. Whether 18 U.S.C. § 1342, making it a crime to use or assume "any fictitious, false or assumed . . . name" for the purpose of mail fraud, should be expanded by interpretation to apply to the use of the names of actual persons and corporations, with their knowledge and consent, where such use could be regarded as designed to conceal the defendant's own role in the particular transaction.

3. Whether the Federal standard of "harmless error" applicable to error of constitutional dimensions, requiring proof beyond a reasonable doubt that the error did not contribute to the verdict of guilty, should also be applied in assessing the effect of acknowledged errors of a non-constitutional nature arising during the trial or in the jury instructions.

4. Whether in reviewing the sufficiency of the evidence against a defendant in a Federal criminal case, an appellate court may properly give greater weight to such evidence or permit the jury to draw otherwise impermissible inferences, merely because of the defendant's failure to take the stand or to offer any independent evidence in support of his defense.

5. Whether 18 U.S.C. § 1341, making it a crime to use the mails "for the purpose of executing" a fraudulent scheme may properly be applied where the alleged scheme involves real estate transactions and the mails are used only to transmit to the addressee, for his convenience,

papers in no way necessary for the execution of the transactions.

6. Whether it was a violation of the fundamental principles of international comity and prejudicial error to permit bank employees who had formerly been employed at a bank in the Bahamas to testify concerning transactions that had taken place at that bank, in direct violation of the order of a Bahamian court prohibiting such testimony under a Bahamian bank secrecy statute.

Statement of the Case

The indictment herein was filed on December 21, 1972 and contained 16 counts (1a, 16a-28a).[2] All the counts were predicated on the charge that defendants had devised a scheme to defraud Mrs. Maria de los Angeles Trujillo de Dominguez and her wholly owned Luxembourg corporation, known as Planinvest Planning and Investing Company, S.A. (hereinafter "Planinvest").

Count 1 charged a conspiracy to violate (a) the mail fraud statute (18 U.S.C. §1341), (b) the statute proscribing the use of fictitious, false or assumed names for the purpose of mail fraud (18 U.S.C. § 1342), (c) the statute relating to communications by wire in interstate or foreign commerce (18 U.S.C. § 1343), and (d) the statute proscribing the transportation of stolen or converted property in interstate or foreign commerce (18 U.S.C. § 2314). The other counts charged substantive violations of the said statutes.

The Government's principal witness was the alleged victim, Mrs. Dominguez, the daughter of the former dic-

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[2] Unless otherwise specified, figures in parentheses followed by the letter "a" refer to the pages of defendants' joint Appendix in the Court of Appeals.

tator of the Dominican Republic, Rafael Trujillo. Mrs. Dominguez took a short trip to this country in July 1967 and then became a permanent resident in September 1967. Defendant Frank, a Washington attorney and former F.B.I. agent, who was a friend of her family, was engaged to take care of security for her and her children while in this country, and Frank hired defendant Borgman (also known as Steve Miller and hereinafter referred to as "Miller") as a bodyguard (186a-187a, 338a).

Mrs. Dominguez had assets of over ten million dollars (191a, 197a-199a, 261a, 264a) and she was intent on maintaining secrecy with regard to her assets because of a 1963 expropriation decree of the Dominican Republic confiscating all properties owned by members of the Trujillo family and because of a suit brought against her in Geneva by relatives who claimed a share of her father's estate (293a-294a, 356a). She made use for that purpose of a dozen different corporations in Spain, Luxembourg, Panama and Switzerland, in which she was a principal, and she had attorneys representing her interests in those jurisdictions (252a-256a, 290a, 337a-338a).

The fraudulent scheme with which the defendants were charged in this case consisted of causing Planinvest to purchase two different parcels of real property situated in Montreal, Canada at inflated prices. The closing of title in both transactions took place at an office of the First National City Bank in Nassau, the Bahamas, the first on January 11, 1968 and the second on February 5, 1968. Each transaction involved three transfers of title—from the orginal seller to an intermediate purchaser, from the latter to a Bahamian corporation, and from the Bahamian corporation to Planinvest. The Bahamian corporation involved in the first transaction was Columbia Corporation Ltd. (hereinafter "Columbia"), the Bahamian corporation involved in the second transaction was Splindian Investments Ltd. (hereinafter "Splindian"), and

a Bahamian attorney, Anthony Hepburn and his secretary, Celia Neill executed the deeds on behalf of those corporations as officers thereof. A Canadian notary, Elie Solomon, also participated in the transactions.

The evidence showed that in the first transaction the parcel involved was sold by the original seller, Dr. C. George Hori to A. Arthur Kay (who was named as a defendant but whose case was severed) for a price of about $79,000, and that the price paid by Planinvest to Columbia was $778,500, but there was no evidence to show how much was paid by Columbia to Kay. The evidence further showed that in the second transaction the parcel involved was sold by the original seller, a Canadian company known as Les Placements Antibes Ltd., to a Miss Comeau for $8,000, and that Planinvest paid Splindian $361,500, but there was no evidence to show how much Splindian paid Miss Comeau. Nor was there any expert testimony as to the values of the two parcels of land involved, or any other evidence of value apart from the evidence as to the prices paid to the original sellers.

The evidence showed that petitioner Hemlock and his law associate, co-defendant Hoffer, were both present at the closing of title in the two transactions in Nassau, and that they attended to a number of the details of the closings. There was no evidence, however, to show that Hemlock or Hoffer had any knowledge of the prices paid to the original sellers—each of the deeds recited only a nominal consideration of "one dollar ($1.00) and Other Good and Valid Consideration"—or that they had any knowledge or reason to suspect that the two transactions had not been fully authorized by Mrs. Dominguez.

Mrs. Dominguez in fact acknowledged the genuineness of her signature on the Planinvest check for $778,500 which was involved in the first transaction (there was no testimony by her with respect to the Planinvest check for $361,500 involved in the second transaction). She also

acknowledged the genuineness of her signature on certified copies of resolutions of the Board of Directors of Planinvest which were produced at the closing and which purported to authorize one Herbert M. Lefkowitz to represent Planinvest in the two transactions. However, she claimed that she did not recall having signed either the check or the two documents, and she sought to create the inference that Frank and Miller had obtained her signatures from her through fraud.

There was also evidence that Hemlock and Hoffer, as well as Frank, had signed signatory cards in connection with time deposit accounts opened in the Nassau branch of the First National City Bank by Columbia and Splindian, and that they had requested the bank to pay out the amounts on deposit after a period of 30 to 60 days, and that the bank had done so in cash in a large amount, between $300,000 and $600,000, but there was no evidence to show to whom the money was paid out (637a-642a, 703a-706a).

There was further evidence that Hemlock and Hoffer, who had done other legal work for Mrs. Dominguez in the fall of 1967 (199a-200a, 268a-269a), had various conferences with her concerning her financial affairs and taxes during the summer of 1968 (219a). In September, 1968, Mrs. Dominguez told Hemlock that she had information "that the lot wasn't worth what was paid for it", and he arranged a meeting for her with Frank and Miller at his office on September 24, 1968 (225a, 226a). At that meeting, according to Mrs. Dominguez, Frank and Miller told Mrs. Dominguez "that it was so that the property wasn't worth what was paid for it and that the difference on the money was used to pay off the CIA because * * * [she] was involved in activities to kill one of the men who assassinated . . . [her] father" (226a). Mrs. Dominguez stated that Hemlock did not participate in this discussion and that he "was very upset" (227a).

At the close of the Government's case, defendants each moved for a judgment of acquittal as well as to dismiss the various counts (713a-728a). The court struck certain of the overt acts and dismissed several counts but otherwise denied defendants' motions (737a, 738a). Defendants then rested without taking the stand or offering any evidence and renewed their prior motions; and the court repeated its prior rulings (738a, 739a).

Additional facts are set forth *infra.*

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has created a novel and unwarranted extension of the Federal hearsay exception relating to co-conspirators' declarations.

The importance of this question is confirmed by the expressed policy of this Court to limit the scope of the "very narrow exception to the traditional hearsay rule" under which hearsay declarations of a conspirator are admissible in evidence against a co-conspirator only if made during the continuance of the conspiracy and in furtherance thereof. See *Wong Sun* v. *United States,* 371 U.S. 471, 490; *Krulewitch* v. *United States,* 336 U.S. 440, 443-5; *Grunewald* v. *United States,* 353 U.S. 391, 399-402; *Dutton* v. *Evans,* 400 U.S. 74, 81.

In *Krulewitch* v. *United States* and *Grunewald* v. *United States, supra,* this Court held that such declarations could not be regarded as having been made in furtherance of an ongoing conspiracy if they were made after the "central criminal purposes" of the conspiracy had been accomplished, and that the life of the conspiracy could not be regarded as extended thereafter merely because the conspirators took steps "to cover up their crime in order to escape detection and punishment" (*Grunewald* v. *United*

States, 353 U.S. at 401-2). This Court emphasized in Grunewald that a contrary rule "would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators" (353 U.S. at 402).

The decision of the Court of Appeals in the present case is in direct conflict with the purpose and underlying policy of the limitations laid down in *Krulewitch* and *Grunewald.* That court has here thus held that though a conspirator's hearsay declarations were made long after the central criminal objectives of the conspiracy had been fully achieved, the declarations will nevertheless be deemed to have been made (a) during the continuance of the conspiracy so long as there was still a threat of civil suit against the conspirators by the victim, and (b) in furtherance thereof so long as the declarations could be regarded as designed to mislead the victim and forestall any civil suit (App. A, *infra,* pp. 20a-21a).

The necessary effect is to sanction an indefinite extension of the life of the conspiracy and of the statute of limitations in any conspiracy case involving a victim who has a potential civil remedy against the conspirators; i.e., the very consequences condemned in *Krulewitch* and *Grunewald.* Thus, since the threat of civil suit would continue during the entire period allowed for suit by the applicable *civil* statute of limitations, the life of the conspiracy would correspondingly be extended throughout that period, under the rationale of the Court of Appeals, and the *criminal* statute of limitations would not begin to run until after the expiration of that period.

The Court of Appeals was apparently of the view that *Krulewitch* and *Grunewald* were distinguishable because there the conspirators' subsidiary purpose after achievement of their central criminal objectives was to conceal

or cover up their crime *"from the Government"*[3] whereas here it was to conceal or cover up their crime *from the victim.* It is submitted, however, that there is no basis or warrant for any such distinction.

The hearsay declarations here in question were made by two of the conspirators, Frank and Miller, to the victim, Mrs. Dominguez on September 24, 1968. The two land transactions which had served as the means for perpetrating the alleged fraud on Mrs. Dominguez, had been consummated, more than seven months before, in January and February 1968. According to Mrs. Dominguez, the only witness who testified with respect to this matter, the declarations consisted of statements by Frank and Miller that "the property wasn't worth what was paid for it and that the difference on the money was used to pay off the CIA" because of activities on Mrs. Dominguez' part to kill one of her father's assassins (226a). Though petitioner Hemlock was present on the occasion when these statements were made, Mr. Dominguez testified that Hemlock did not participate in the discussions and that he "was very upset" (227a).

As the Court of Appeals made clear, the objections of petitioner Hemlock as well as of co-defendant Hoffer to the admission in evidence against them of the declarations made by Frank and Miller were properly raised,[4] and the

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[3] The Court of Appeals added, in brackets, the words "from the Government" in quoting from the Court's opinion in *Krulewitch* (see App. A, *infra,* p. 21a).

Unless otherwise specified, emphasis throughout this Petition is supplied.

[4] As the Court of Appeals noted (App. A, *infra,* p. 20a, fn. 16), the trial judge had previously "ruled that he would provisionally admit all declarations of alleged conspirators subject to a subsequent blanket motion to strike evidence the submission of which was not warranted under the conspiracy exception" (195a, 203a, 217a-218a, 519a, 566a), and such a motion to strike was made by each defendant at the close of the Government's case (727a).

Court treated petitioner Hemlock's position as identical with that of co-defendant Hoffer, who had not been present when the Frank-Miller declarations were made (App. A, *infra*, p. 20a).[5]

Though the Court of Appeals described the issue presented as a "troubling" one, it held that, despite *Krulewitch* and *Grunewald*, the conspiracy continued even after consummation of the two fraudulent transactions "so long as Mrs. Dominguez was threatening to get the money back", and the Frank-Miller declarations were in furtherance of the conspiracy since they were apparently intended to "turn away Mrs. Dominguez or at least diminish her ire and the consequent zeal of her pursuit" (App. A., *infra*, pp. 20a-21a).[6]

What the Court of Appeals was evidently suggesting was that the life of the conspiracy continued even after accomplishment of its central criminal objectives so long as the conspirators might see fit to take steps to retain the fruits of their crime, and that a co-conspirator's declarations made during that extended period could be regarded as having been made in furtherance of the conspiracy if their purpose was to forestall any civil suit by the victim. It is

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[5] Hemlock's mere presence at the meeting of September 24, 1968 was insufficient *per se* to establish his approval or adoption of the Frank-Miller declarations. *Cf. United States* v. *Fantuzzi*, 463 F.2d 683, 690 (2d Cir.). Furthermore, Mrs. Dominguez' testimony that Hemlock "was very upset" when the declarations were made (227a), itself negated any possible inference that Hemlock impliedly acquiesced in such declarations or that he had any prior knowledge of the alleged facts asserted by Frank and Miller. *Cf. Milam* v. *United States*, 322 F.2d 104, 107, 108 (5th Cir.).

[6] There was not an iota of evidence in the record to support the speculative suggestion made by the Court of Appeals that "the conspiracy could well be regarded" as extending beyond the two fraudulent land transactions on the notion that "[t]he evidence suggests that the conspirators thought they had a good thing in Mrs. Dominguez and would defraud her further if the opportunity arose" (App. A, *infra*, p. 21a).

clear, however, that any efforts on the part of the conspirators to retain the fruits of their crime or to forestall a civil suit by the victim would be the equivalent of a purpose to "conceal" or "cover up" their crime such as was involved in *Krulewitch* and *Grunewald.*

The Court of Appeals further ruled that the admissibility of the declarations made by Frank and Miller could be sustained on the alternative theory of "a declaration against pecuniary interest by a declarant unavailable to testify" (App. A, *infra,* p. 21a). The adoption of any such rule, however, would vitiate and erode the limitations laid down in *Krulewitch* and *Grunewald,* as well as the doctrine of *Bruton* v. *United States,* 391 U.S. 123, in any conspiracy prosecution involving a victim who has a potential remedy against the conspirators. Under the reasoning of the Court of Appeals, it would be no bar to the admissibility of a co-conspirator's hearsay declaration as against his fellow conspirators, that the declaration was made after the conspiracy had been consummated or was not in furtherance thereof; it would be sufficient that the declaration would have some bearing on the declarant's potential civil liability to the victim and that the declarant was "unavailable to testify" because he was a co-defendant who chose not to take the stand.

2. The Court of Appeals has given an expanded reading of the "fictitious name" statute, 18 U.S.C. § 1342, contrary to the rule that criminal statutes must be read narrowly and literally.

The Court of Appeals expanded the scope of the "fictitious name" statute, 18 U.S.C. § 1342, beyond its literal requirement that there be a use or assumption by the defendant of a "fictitious, false or assumed" name, so as to render it applicable to the use by the defendant of the trues names of actual persons and corporations, with their

full knowledge and consent, where the defendant's purpose is to conceal his own role in the particular transaction. The Court upheld the convictions of the defendants herein under § 1342 on its expanded reading of the statute, even though it acknowledged that there was no evidence that "any participant used or assumed or requested to be addressed by any fictitious, false or assumed name", and that the defendants were only shown to have used the names of actual persons and corporations with their full knowledge and consent—i.e., the two Bahamian corporations, Columbia and Splindian; and the two officers thereof, Hepburn and Miss Neill, who signed the deeds on their behalf (App. A, *infra*, pp. 17a-18a).[7]

The question is one of first impression in this Court and is an important one, since the expanded scope accorded to the statute by the interpretation of the Court of Appeals could well lead to a multitude of Federal prosecutions thereunder in transactions involving the use of the mails in which the corporate form of business is employed or in which an agent has entered into the particular transaction on behalf of an undisclosed principal, and a disgruntled customer charges that the principal used the name of the corporation or the agent to conceal his own interest in the transaction.

None of the cases cited in the opinion of the Court of Appeals (App. A, *infra*, pp. 18a-19a) support its expanded reading of the statute. That expanded reading contravenes the settled doctrine that "a criminal statute . . . must be strictly construed, and any ambiguity must be resolved in favor of lenity." *United States* v. *Enmons*,

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[7] The Court of Appeals observed that if the evidence did not support a finding of a violation of § 1342, "there would have to be a reversal not only of the convictions [of defendants] under Counts 6 and 7 but perhaps also of the conviction on the conspiracy charge, Count 1, since the [trial] judge instructed that a finding of a conspiracy to violate § 1342 would warrant a conviction on the conspiracy count" (App, A, *infra*, p. 17a).

410 U.S. 396, 411; *United States* v. *Bass*, 404 U.S. 336, 346-7. Indeed, the effect of convicting the defendants herein on the basis of such an expanded interpretation of the statute which is in no way fairly suggested by its language, legislative history or prior judicial interpretation, is to run afoul of due process limitations against exposing "a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct." *Rowan* v. *United States Post Office*, 397 U.S. 728, 740; *United States* v. *Cardiff*, 344 U.S. 174, 176.

3. The Court of Appeals has raised a critical and unresolved question whether the "harmless error" doctrine applicable to errors of constitutional dimensions should also be applied to errors of non-constitutional dimensions.

The Court of Appeals acknowledged that the trial judge had committed error (a) in charging the jury that the Government's main witness, Mrs. Dominguez, who had brought a separate civil action against petitioner and two of his co-defendants on the same charges of fraud,[8] would not derive any benefit in her civil action from a conviction in the criminal action; and (b) in refusing defense counsel's request for an instruction that a conviction could operate to Mrs. Dominguez' advantage in the civil action because of the collateral estoppel effect to which it would be entitled (App. A, *infra*, pp. 29a-32a).

The Court of Appeals nevertheless held that the trial judge's acknowledged error in this regard was "harmless

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[8] That action was brought in the name of Mrs. Dominguez' corporation, Planinvest, against petitioner Hemlock and co-defendants Frank and Borgman in the United States District Court for the Southern District of New York on the basis of diversity of citizenship, and it is still pending (App. A, *infra*, pp. 13a-14a, 29a).

error".[9] In reaching that conclusion, the Court distinguished cases involving error "of constitutional dimensions" and held that because the error before it was not of that kind, the applicable standard of "harmless error" was that of *Kotteakos* v. *United States*, 328 U.S. 750, 764-5, rather than that of *Chapman* v. *California*, 386 U.S. 18, 24. Under *Chapman*, it would have to be established "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" before it could be held harmless.

This Court, however, has never actually held that the *Chapman* test does not equally apply to non-constitutional error. When this Court decided *Kotteakos* in 1946, it was unnecessary for it to determine whether a more stringent standard of "harmless error" should be applied to the non-constitutional error there involved, since such error was held *not* to be harmless even under the standard there applied. *Chapman* was decided 20 years later, in 1966, and though the error there involved was of a constitutional

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[9] The Court of Appeals relied on the fact that the trial judge had given general instructions to the jury that they could take into account the interest or bias of a witness in appraising the latter's credibility (App. A, *infra*, pp. 27a-28a, 33a). The Court, however, overlooked the crucial consideration that the trial judge's erroneous charge flatly undercut and nullified defense counsel's fully warranted argument to the jury, on opening and in summation, that in appraising Mrs. Dominguez' credibility, it was important for the jury to consider that she was "using this criminal case for her civil suit" (163a), and that if "she wins here [in the criminal action], that means she will win in her civil suit" (812a).

The Court further overlooked the vast difference between (a) the image of Mrs. Dominguez that was conveyed to the jury by the trial judge—that of a witness who might be biased against the defendants but could not gain anything from a conviction; and (b) the image of her that would have been conveyed by a correct charge—that of a witness who was virtually a party to the criminal action because a conviction would mean an automatic victory for her in her civil action.

nature, this Court in no way indicated that it would not apply the same standard in assessing the effect of other types of error.

Actually, in view of the general requirement in Federal criminal cases that guilt be established "beyond a reasonable doubt", it would seem reasonable to apply a "reasonable doubt" standard of "harmless error", such as that of *Chapman*, in all such cases, regardless of whether the error involves a constitutional question. Indeed, several panels of the Second Circuit have questioned whether there is any warrant for applying different standards of harmless error on the basis of whether the error affects constitutional rights. *United States* v. *Semensohn*, 421 F.2d 1206, 1208 (2d Cir.) (applying the *Chapman* standard in a case of non-constitutional error); *United States* v. *Chason*, 451 F.2d 301, 305, fn. 2 (2d Cir.).

The Court of Appeals further acknowledged that the trial judge approached the threshold of error in permitting Mrs. Dominguez freely to resort to a Spanish interpreter on cross-examination, without any showing of need therefor, notwithstanding that the "direct examination was conducted almost entirely in English" (App. A, *infra*, pp. 24a-25a). Though what was involved was the defendants' constitutional right of confrontation, the Court of Appeals disposed of the matter on the ground that it was not "*sufficiently prejudicial* to require a reversal" (App. A, *infra*, p. 26a). Here again, the Court apparently declined to apply the *Chapman* test.

It is submitted that the entire subject of harmless error is worthy of reconsideration and review by this Court. It has thus been suggested that the Second Circuit has on occasions been influenced by extraneous considerations in its application of the harmless error doctrine. See David G. Trager, "Harmless Error: A Doctrine for All Seasons", 39 Brooklyn Law Rev. 1043 (1973). Similarly, in the

present case, the court's prominent reference in its opinion to the defendants' failure to take the stand or offer any evidence (App. A, *infra*, pp. 15a-16a), may well have influenced its decision to disregard the error below.

4. In reviewing the sufficiency of the Government's proof of guilt, the Court of Appeals has raised important questions as to the weight to be given to such proof and as to the jury's right to draw otherwise impermissible inferences therefrom, where the defendant has declined to take the stand or offer any independent evidence.

In the court below Hemlock and Hoffer urged that the evidence was insufficient as a matter of law to warrant their conviction. As the Court of Appeals observed, their claim was "that the evidence is consistent with their having simply engaged in professional activities and that any wrongdoing was solely Frank's and Miller's" (App. A, *infra*, p. 14a). In rejecting that claim, the Court of Appeals held that, as lawyers, Hemlock and Hoffer were on notice of facts relating to the fraud to which they could not "shut their eyes".

The court, however, apparently recognized the weakness of the evidence against Hemlock and Hoffer, for after reviewing the evidence, it went on to state (App. A, *infra*, pp. 15a-16a):

> "In passing on the sufficiency of the evidence, the court had only the prosecution's case, the defense having offered none. To be sure, the defendants were not required to testify or to present any case at all, and the jury could not permissibly draw an adverse inference simply from their failure to take the stand. But the self-incrimination clause does not elevate a defendant's silence, much less the failure to present any defense case, to the level of a convincing refutation.

> When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version. The test of sufficiency in criminal cases is 'whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' * * *"

The approach thus taken by the Court of Appeals was evidently that in determining the legal sufficiency of the Government's evidence, an appellate court could take into account the fact that the defendant had not taken the stand or presented any independent evidence and could in fact accord greater weight to the Government's proof and accord greater leeway to the jury in drawing otherwise impermissible inferences from that proof. It is settled, however, that a court may not "solemnize the silence of the accused into evidence against him" (*Griffin* v. *California*, 380 U.S. 609, 614), and that the failure of a defendant to testify cannot serve to give "added weight" to the Government's proof (*Langford* v. *United States*, 178 F.2d 48, 55-6 [9th Cir.]).

Moreover, the approach here taken by the Court of Appeals overlooks the fact that Rule 29(a) of the Federal Rules of Criminal Procedure provides that "[t]he court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal * * * after the evidence *on either side* is closed if the evidence is insufficient to sustain a conviction * * *". Manifestly, if the Government's evidence "is insufficient to sustain a conviction" at the close of the Government's case, the defendant is entitled to a judgment of acquittal if he moves therefor at that stage of the case, and he cannot be deprived of his right thereto

merely because he chooses to stand on that right and accordingly decides not to take the stand or present any independent evidence of his own.

Furthermore, many of the elements of the Government's proof which the Court of Appeals stressed in sustaining the sufficiency of such proof against petitioner Hemlock consisted of items of proof which petitioner could only have rebutted by taking the stand himself, such as his failure to advise Mrs. Dominguez about the matters involved (App. A, *infra*, p. 15a). Obviously, for the court to give added weight to the Government's proof because of petitioner Hemlock's failure to rebut Mrs. Dominguez' testimony by his own contrary testimony, would make a mockery of petitioner's Fifth Amendment privilege against self-incrimination and his right not to have any adverse inference drawn against him by reason of his failure to testify in his own defense (*Chapman* v. *California*, 386 U.S. 18; 18 U.S.C. § 3481).

5. The Court of Appeals has applied the mail fraud statute, 18 U.S.C. § 1341, contrary to the standards established by this Court in *United States* v. *Maze*, 38 L.Ed. 2d 603.

Counts 12 and 13 of the indictment charged use of the mails in violation of 18 U.S.C. § 1341, in that Hoffer had mailed to the notary, Solomon, on January 15 and 25, 1968, copies of the incorporation papers of Columbia and Planinvest (564a-565a, 568a). Solomon had requested these papers at the closing of the first land transaction on January 11, 1968, and Hoffer had promised to mail them to Solomon within the next week or two (542a-543a), but Solomon had nevertheless proceeded forthwith with the connsummation of the transaction, including the filing of the pertinent documents in the Montreal Registry Office (547a, 552a, 554a, 560a-561a). Solomon thereafter wrote

to Hoffer on January 30, 1968 and asked for further information concerning Planinvest (569a-570a), but even though he never received that information, he proceeded with the consummation of the second transaction in Nassau on February 5, 1968 (577a, 584a).

There was not the slightest indication that the papers which Solomon requested and which Hoffer sent to him were in any way necessary for the carrying out of either of the two transactions here involved. So far as appears, Solomon asked for those papers merely for his own personal convenience.

Defense counsel duly moved to dismiss Counts 12 and 13 for insufficiency of proof, but their motions were denied by the trial judge (717a, 721a). This Court has recently reaffirmed in *United States* v. *Maze, supra,* 38 L.Ed.2d 603, the principles previously enunciated by it in *Kann* v. *United States,* 323 U.S. 88, 95, and *Parr* v. *United States,* 363 U.S. 370, 389-90), that "the federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law", and that one of the essential elements of the crime of mail fraud is the requirement "that the mailing must be for the purpose of executing the fraud" (*Kann* v. *United States, supra,* 323 U.S. at 95).

In *United States* v. *Maze, supra,* a case involving the fraudulent use of a credit card, this Court held that there was no violation of the mail fraud statute by the defendant where the mailing occurred only after the defendant had obtained the goods and services with the use of the credit card and the mailings were employed by the victims to obtain reimbursement. This Court held that the mailings in such a case could not be regarded as having been "for the purpose of executing" the fraudulent scheme.

It is submitted that the *Maze, Kann* and *Parr* cases are squarely here in point and entitle petitioner Hemlock to dismissal of the two counts of the indictment charging violations of the mail fraud statute. The Court of Appeals in the present case may well have appraised the sufficiency of the evidence relating to the mail fraud counts in the light of the approach previously taken by it in cases such as *United States* v. *Chason*, 451 F.2d 301 (2d Cir.), cert. den. 405 U.S. 1016, which this Court noted was inconsistent with the decision in the *Maze* case (see *United States* v. *Maze, supra*, 38 L.Ed.2d at 607, fn. 2). It is submitted that the sufficiency of the evidence in the present case should be reevaluated in the light of this Court's decision in *Maze*.

6. The Court of Appeals committed error and violated the principles of international comity in approving the introduction of testimony in a Federal trial in direct violation of a lawful order of a Bahamian court entered under a Bahamian bank secrecy statute.

Petitioner respectfully adopts by reference the treatment of this question in the companion petition for certiorari filed with this Court by co-defendant John J. Frank (*Frank* v. *United States*, No. 73-1674).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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EUGENE GRESSMAN,
Of Counsel.

APPENDIX A

Opinion of Court of Appeals

APPENDIX A

Decision and Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 578-581—September Term, 1973.

(Argued December 20, 1973 Decided February 25, 1974.)

Docket Nos. 73-2384
73-2425
73-2495
73-2408

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK,
HARRY HOFFER, and STEPHEN BORGMAN,
a/k/a Steve Miller, a/k/a Stephen Berman,

Defendants-Appellants.

Before:

FRIENDLY, HAYS and OAKES,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Milton Pollack, *Judge,*

convicting defendants, after a verdict, of conspiracy, various substantive offenses under the mail fraud statutes, 18 U.S.C. §§ 1341-43, and interstate or foreign transportation of stolen money, 18 U.S.C. § 2314. Affirmed.

W. CULLEN MACDONALD, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, and S. Andrew Schaffer, Assistant United States Attorney, of Counsel), *for Appellee.*

LOUIS BENDER, ESQ., New York, N. Y., *for Appellant Frank.*

ARTHUR KARGER, ESQ., New York, N. Y., *for Appellant Hemlock.*

HERALD PRICE FAHRINGER, ESQ., Buffalo, N. Y., *for Appellant Hoffer.*

JOHN M. MCGILLICUDDY, ESQ., New York, N. Y. *for Appellant Borgman.*

FRIENDLY, *Circuit Judge*:

Count 1 of this indictment in the District Court for the Southern District of New York charged the four appellants[1] with conspiring, 18 U.S.C. § 371, to violate the statutes relating to mail fraud, 18 U.S.C. § 1341-43, and interstate or foreign transportation of stolen money, 18 U.S.C. § 2314. Counts 2 through 5 charged appellants with the substantive offense of interstate or foreign transportation of two certified checks in violation of § 2314. Counts 6

[1] The indictment also named as so-conspirators A. Arthur Kay and Maurice S. Hebert, who are unarrested fugatives.

and 7 charged them with violating 18 U.S.C. § 1342 by using fictitious names in carrying out a scheme to defraud by mail. Counts 8 through 16 charged them with unlawful use of mail and wire communication facilities in violation of § 1341 and § 1343.[2] The jury returned guilty verdicts against all appellants on the conspiracy and fictitious name counts. Frank Hemlock and Hoffer were found guilty on the unlawful transportation counts. Hemlock and Hoffer were found guilty on two of the mail fraud counts. The jury acquitted on the remaining counts. The judge imposed substantial prison sentences on all defendants and a $10,000 fine on Hemlock.

I. *The Facts*

The case concerns a fraud allegedly perpetrated on Mrs. Marie Dominguez, the then 28-year-old daughter of former President Rafael Trujillo of the Dominican Republic. Since appellants all challenge the sufficiency of the evidence to warrant submission to the jury, it is necessary to summarize the evidence presented against each defendant. Taken in a light favorable to the Government the facts are as follows:

In the summer of 1967, Mrs. DeLeon, as Mrs. Dominguez then was, left her husband's home in Madrid and came to this country with two of her children. Apparently because her property was the subject of confiscation decrees by the Dominican government, she had placed it in the name of a number of corporations in countries

[2] Judge Pollack did not submit counts eight, eleven and sixteen to the jury but dismissed them at the close of the Government's case.

with bank secrecy laws. One of these, a Luxembourg corporation called Planinvest, held a $2.4 million certificate of deposit in the London offices of the Bank of London and South America.

When she arrived in this country, Mrs. Dominguez was met at the airport by defendant John Joseph Frank, an attorney with an office in Washington, D.C., and a former agent with the F.B.I. and the C.I.A. Mrs. Dominguez' husband had engaged Frank to obtain an entry visa for her, apparently because he had provided security services for the Trujillo family in the past. Frank was accompanied by defendant Borgman, whom he introduced as "Steve Miller", the name we shall also use.

Shortly thereafter, Frank and Miller introduced Mrs. Dominguez to defendant Hemlock, a New York attorney with whom defendant Hoffer was associated. Hemlock agreed to participate in a ruse for the benefit of Mrs. Dominguez whereby, under the pretext of a business negotiation, he would divert her previous husband, Mr. DeLeon, from Madrid to Barcelona, while she took possession of certain of her belongings in the family home in Madrid. The plan succeeded. In September Hemlock and Hoffer began to advise Mrs. Dominguez on a property settlement with her husband, from whom, with the aid of Frank and Miller, she had obtained a Mexican divorce. In the course of this, they learned of Planinvest. Hemlock and Mrs. Dominguez instructed the London bank to transmit interest payments to her personal account at the Bank of New York and to send all communications relating to the Planinvest account "in care of Hemlock, List, Hoffer & Becker, Esqs." at their New York office. In October, on the advice of Frank and Miller, she opened a second

account, at the New York branch of the Bank of London and South America. That account was opened in the name of Planinvest, "c/o John J. Frank, 1500 Massachusetts Avenue, Washington, D.C." Mrs. Dominguez signed one signature card for the account, and Frank and Miller signed a second card to enable them to request statements, deposit slips, checks or a balance relating to the account.[3] During the fall of 1967, Frank and Miller largely took over the conduct of Mrs. Dominguez' day-to-day financial affairs. They had custody of her checkbook, they prepared batches of checks for her signature, and they cashed checks for her at the banks.

Sometime during that fall, Frank and Miller began to recommend that Mrs. Dominguez invest in foreign land, avowedly to avoid loss in the devaluation of the dollar—advice that proved to be wise, although premature—and to avoid high United States taxes. After an adverse reaction from Mrs. Dominguez' brother, Frank and Miller returned to the charge with a recommendation specifically suggesting that she buy Canadian land. According to Mrs. Dominguez, Miller insisted that Canada was booming and that a land purchase there "would be a wonderful investment." Mrs. Dominguez agreed to consider any specific property that they might suggest, but specified that in no event was she willing to spend more than $200,000.

Mrs. Dominguez' limited acquiescence provided an entry for the Canadian land manipulations through which the fraud was sprung. On January 9, 1968, a Dr. George C. Hori sold a parcel of land in the northeastern part of

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[3] On the Government's theory of the case this account served no purpose save as a vehicle for subsequent frauds.

Montreal. The price of the land was $79,000, of which $22,000 was to be paid him in cash and the balance was to be used to clear existing mortgages. The deed executed in the office of a notary, Maitre Elie Solomon, named as the purchaser A. Arthur Kay, one of the two unarrested co-defendants named in the indictment. The parties instructed the notary to hold the deed pending payment into his trust account for disbursement to Dr. Hori and the mortgagees. The notary asked Kay for the names of the Bahamian company to which Kay was planning to resell the land and of the European company to which it would be resold again; Kay said the information would come in a call from New York. Several hours later, Mtre. Solomon received such a call; he was not sure whether it was from Hoffer or Hemlock.[4] The caller said the first name of the Bahamian corporation was "Columbia"; the rest of the information would be supplied the next day in the Bahamas. The notary in turn requested that the caller procure a resolution from the ultimate purchaser authorizing the purchase. He dictated a proposed resolution that would meet the requirements for effecting the transfer.

On January 10, Mtre. Solomon, Kay, co-defendant Maurice S. Hebert, and an attorney, Irving L. Adessky, flew from Montreal to Kennedy Airport in New York City. At

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[4] Solomon testified on direct examination that the call from New York had come from "a gentleman who identified himself as Mr. Harry Hoffer." The court subsequently struck out his direct testimony concerning the telephone call for lack of foundation, but counsel for Hoffer on cross-examination elecited from Solomon that before the grand jury he had testified he had received a call from "either Mr. Hemlock or a member of his firm."

the same time Miller had the New York branch of the Bank of London and South America certify a Planinvest check for $778,500 to Columbia Corporation Ltd.[5] Hemlock, inferably with the check in hand, joined the Montreal party at the airport, whence they flew to the Bahamas, where Hoffer was awaiting them.

The next day the entire group met with a Bahamian attorney, Anthony Hepburn, and his secretary Celia Neill. Kay signed a deed transferring the property to Columbia, which was represented by Hepburn and Neill, its vice-president and assistant secretary. The further transfer from Columbia to Planinvest was delayed because neither Hemlock nor Hoffer had brought a Planinvest resolution authorizing anyone to execute the deed of purchase. While the group was waiting for the arrival of the resolution, Hoffer, in Hemlocks' presence, informed Mtre. Solomon that Planinvest would be represented by one Herbert M. Leftkowitz as agent but that the deed should refer to Planinvest in care of Frank at his Washington, D.C. office; Hoffer also promised to send Solomon certified copies of the charters of Columbia and Planinvest.

A man identified as Lefkowitz appeared at around 1:30 p.m. He produced a resolution which the notary said was substantially what he had dictated to either Hoffer or Hemlock in their telephone conversation two days before.

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[5] The check is signed in the name of Angelita De Leon (the name Mrs. Dominguez used during her first marriage), as President of Planinvest; the Government did not dispute that the signature was hers. The basis for the certification was a telexed tranfer of $780,000 from the main office in London. The record is silent on who directed the transfer.

The resolution recited that at a meeting in New York on January 9, Planinvest had authorized the purchase of the property from Columbia for $1.00 and other good and valuable consideration and had designated Lefkowitz to sign the deed, the document purported to be certified by Mrs. DeLeon as President and Secretary. The notary thereupon authorized execution of the deed from Columbia to Planinvest. However, since he had not received the $79,000 required to clear the initial transaction, the notary refused to release the certified copy of the deed from Columbia to Planinvest. The meeting then adjourned pending the arrival of the funds.

During the same day, January 11, Hemlock and Hoffer met with the Nassau branch manager of the First National City Bank (FNCB), Michael Latvis. They opened accounts for Columbia and for Splindian Investments Limited, another Bahamian corporation. The accounts provided that withdrawals could be made only with the authorization of Hemlock, Hoffer and Frank. Hemlock and Hoffer signed the signature card at that time; Frank's signature was obtained later. Hemlock and Hoffer then presented the $778,500 check from Planinvest to Columbia and arranged for a portion of this to be kept in a time deposit.[6] Notwithstanding the certification, FNCB would not extend immediate credit until the check had been accepted for clearance at the Federal Reserve Bank at New York, a procedure which would normally take eight days. Hoffer and Hemlock suggested the dispatch of a messenger to expedite clearance of the check. Latvis' secre-

[6] Latvis testified that time deposits were available on a 30- and 90-day basis and that to the best of his memory, the deposits in question were placed on a 90-day basis.

tary, Miss Elizabeth Reilly, volunteered for the trip, for which Hoffer and Hemlock made the arrangements.

Miss Reilly presented the check for processing at FNCB in New York around 10:30 a.m. on July 12. That same morning Hemlock, Hoffer, Kay and Hebert met with the notary and Adessky in Nassau; either Hemlock or Hoffer gave Adessky and the notary $500 apiece as compensation for their services. The two lawyers then left for New York. Later Kay took the notary to the Nassau branch of FNCB, where the transfer of $79,000 to the notary's trust account in Montreal was arranged. The notary flew the next day to New York; by prearrangement Hoffer met him at the airport and received a "special copy" of the deed from Columbia to Planinvest.[7] On January 15 Hoffer sent Solomon a copy of Columbia's charter, showing it had been incorporated on November 27, 1967.

Shortly thereafter, Miller told Mrs. Dominguez she had purchased land in Canada. After she protested that she had authorized only inquiry and not action, Frank came into the room. Miller asked if she remembered signing "the check"; she did not. Frank then advised her not to worry and assured her that "everything is all right." In answer to a question concerning the cost of the property, he answered that it was "within the limits" she had previously set. Sometime later, Miller showed her some clippings from U.S. News & World Report and the Wall Street Journal that reported new mineral explorations in various parts of Quebec. Miller told her that the discoveries had already caused her tract of marshy, swampy land near Montreal to appreciate.

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[7] The "special copy" differed from the deed that was delivered in that it did not contain a copy of the resolution but merely referred to a duly authorized resolution.

Appendix A

About a week after the first transaction, Kay inquired whether the notary would be interested in arranging for the sale of some 150,000 square feet of a farm owned by a corporation in which the notary held a minority interest, for no more than $8,000. When Solomon expressed reluctance to proceed with the transaction before hearing from Hemlock or Hoffer, Kay paid him $500 to cover the notarial fees and the preliminary costs of subdivision. The notary thereupon began making arrangements for the sale.

Kay subsequently told the notary that the scenario for the second transaction would resemble that for the first, save for a few changes in names. This time Denise Comeau would take Kay's place as the first purchaser and Splindian, whose charter he delivered to the notary, would be the second. Meanwhile, Mtre. Solomon received a copy of the Planinvest charter from Hoffer; he was disturbed to discover that Planinvest was not expressly empowered to buy and sell land as required by Canadian law, and asked for a copy of the Luxembourg laws that might aid in implying the requisite power. Hoffer never supplied the Luxembourg statutes or any other proof that Planinvest could engage in Canadian real estate transactions.

Miller told Mrs. Dominguez around this time that a very good piece of land in Canada was being sold for tax reasons at less than its worth. She at first demurred, saying that she was unwilling to buy any more land in Canada. Miller then telephoned Frank in her presence and said, "John, she doesn't want to buy the land." After that conversation, Miller once again urged her to consent to the purchase. Finally, she agreed to consider the land, but she insisted that Miller first send a letter to the Bank of London and South America requesting three

different bank appraisals. Miller typed the letter as instructed, but Mrs. Dominguez testified that she never received any response from the bank.

On February 2, 1968 Miller presented to the New York branch of the Bank of London and South America a Planinvest check in favor of Splindian in the sum of $361,500, which the bank certified in consequence of a prior transfer of that sum from London. Two days later the notary Adessky, Kay and Denise Comeau flew to New York. Hemlock joined them, inferably with the certified check in hand, and the group flew on to Nassau where Hoffer was awaiting them.

The following morning the group met with Hepburn, Miss Neill and Lefkowitz for the second closing. The deeds from Solomon's corporation to Miss Comeau and from her to Splindian, acting through Hepburn and Neill, were promptly executed. Although Hoffer supplied no evidence that Planinvest was empowered to purchase foreign real estate, as the notary had requested, the deed from Splindian was executed by Hepburn and Neill, and accepted for Planinvest by Lefkowitz. Hemlock and Hoffer went on to the FNCB, made a time deposit in Splindian's account, and arranged for Miss Reilly to make another trip to New York to expedite the clearance of the Planinvest check. Shortly thereafter Kay paid Solomon $10,856 for the land; $2,856 of this was rebated to Kay upon their return to Montreal.

In February or March, 1968, Arcadio Santana, a former family accountant, left the employ of Mrs. Dominguez' former husband and joined her in New York. She asked him to ascertain from Frank and Miller the precise amount of money that Planinvest had spent on the one acquisition of which she was then aware. Apparently Sant-

ana learned that $778,000 had been paid; when Mrs. Dominguez taxed Frank with this, he once again urged her not to worry and assured her that it was "a good piece of land" and that it was worth the price she paid for it. Shortly thereafter, Hemlock, Hoffer and Frank went to the FNCB in Nassau and asked Latvis to break the time deposits and pay them out in cash, which he did. Since the bank records were not available at the trial because of the Bahamian bank secrecy laws, he could testify only that they withdrew "a large amount, perhaps from 300 to $600,000, $300,000 to $600,000." Also during March, 1968, Frank gave Mrs. Dominguez the special copy of the deed to the Hori tract, see note 7; when she asked him to explain the nominal consideration of one dollar, he called in Miller, who told her that such recitations were usual in Canada.

Unsatisfied with Frank's explanation of the large expenditure, Mrs. Dominguez and her new husband met with Hemlock that June at her home in Queens. The couple gave Hemlock the special copy of the deed and requested that he investigate the transaction. Mrs. Dominguez testified that she thought Hoffer was present at that meeting but could not be certain.[8] Further meetings were held through the summer, primarily for the purpose of discussing Mrs. Dominguez' tax returns which were being prepared by a tax specialist recommended by Hemlock and Hoffer. At one meeting Mrs. Dominguez expressed concern about the Canadian property being in the name of Planinvest, which she thought was not supposed to own land directly. Neither Hoffer nor Hemlock revealed

[8] Mrs. Dominguez testified that although she could not recall which of the summer meetings Hoffer attended, she was certain that he had been at most of them.

their previous exposure to this problem or the purchase from Maitre Solomon. As time passed without the receipt of a report on the initial purchase from Hemlock and Hoffer, Mrs. Dominguez dispatched Santana to Montreal. Early in September, 1968, at a meeting attended by Hemlock, Hoffer and others, she told Hemlock she had learned that he had been in Canada several times making arrangements for the purchase of the lot; he replied "I smell a rat" and "I think somebody has been using my name,"[9] but did not reveal what he in fact knew. She also told Hemlock she had been informed that the lot wasn't worth what was paid for it; Hemlock responded by proposing to set up a meeting with Frank and Miller.

This meeting occurred on September 24 at Hemlock's office. Its first phase was attended by Mrs. Dominguez, Frank, Miller and Hemlock.[10] This time Frank and Miller admitted that the land was not worth what had been paid, but they explained that the difference had been used to pay off the C.I.A. because she had been involved in activities to kill one of her father's assassins. Miller and Frank then left. Mr. Dominguez entered and Hemlock repeated what they had said. In the course of the meeting, Hemlock told Mr. and Mrs. Dominguez nothing about the many other circumstances of the two transactions of which he was aware. Subsequently, Mrs. Dominguez obtained other counsel who began a civil action on her behalf in the

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[9] The record contains no evidence that Hemlock had made such trips.

[10] Hemlock had endeavored to persuade Mrs. Dominguez to come without her husband. After this failed, he did prevail on the husband to wait outside his office.

Appendix A

District Court for the Southern District of New York against Frank, Miller and Hemlock.

II. *Sufficiency of the Evidence*

Putting aside for the moment defendants' legal attack on the charges relating to the fictitious name statutes, 18 U.S.C. § 1342, we think Frank's and Miller's claims of insufficiency are so palpably devoid of merit as not to warrant extended discussion. They were the instigators of the scheme to expend $1,140,000 of Planinvest's funds for land that had been purchased for a total of $89,000, and one or the other or both participated in every phase of the plot. All this is crowned by their admission at the final meeting with Mrs. Dominguez that, contrary to their prior assertions, the land was not worth what they paid for it.

Hemlock and Hoffer claim that the evidence is consistent with their having simply engaged in professional activities and that any wrongdoing was solely Frank's and Miller's. Hoffer makes the further argument that he was acting in a subordinate capacity and thus was even farther than Hemlock from the odoriferous stream of guilty knowledge. But too many red flags were flying to make these contentions plausible. It is useful to recall Judge Learned Hand's observation that "the cumulation of instances each explicable only by extreme credulity or professional inexpertness, may have a probative force immensely greater than any one of them alone." *United States* v. *White,* 124 F.2d 181, 185 (2 Cir. 1941). We repeat also that lawyers cannot "escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen," *United Sates* v. *Benjamin,* 328 F.2d 854, 863 (2 Cir.), *cert. denied,* 377 U.S. 953 (1964). See also *United States* v.

Sarantos, 455 F.2d 877, 880-82 (2 Cir. 1972), and cases there cited. If Hemlock and Hoffer were acting as attorneys, their client was Planinvest, which they knew to be simply Mrs. Dominguez in an incorporated form. Yet there is no indication that they ever advised her about the seemingly needless interposition of Columbia and Splindian, that they ever made the slightest inquiry concerning the relationship between the large Planinvest certified checks and the modest price which they knew was paid to the Canadian owners, or that they ever notified Mrs. Dominguez that the second transaction had occurred at all. Perhaps the most damaging evidence against them was their personal participation with Frank in the breaking of the time deposit just after Frank had learned that the jig might be beginning to be up. Whether or not they received any portion of the proceeds, they had beheld Frank walking out of the FNCB in Nassau with $300,000 to $600,000 in cash generated by the Planinvest checks to Columbia and Splindian. Six months later, and three months after Mrs. Dominguez had instructed them to investigate the first transaction, they had revealed nothing. Their silence throughout the summer, in light of their intimate familiarity with many of the details of the two purchases, makes their claim of innocence highly implausible. Hemlock's efforts to prevent Mr. Dominguez from attending the showdown on September 23 and his bland reaction to a revelation by Frank and Miller that would have caused an honest lawyer to erupt in fury are the final straws as far as he is concerned.

In passing on the sufficiency of the evidence, the court had only the prosecution's case, the defense having offered none. To be sure, the defendants were not required to testify or to present any case at all, and the jury could not

permissibly draw an adverse inference simply from their failure to take the stand. But the self-incrimination clause does not elevate a defendant's silence, much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version.[11] The test of sufficiency in criminal cases is "whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *Curley* v. *United States*, 160 F.2d 229, 232-33 (D.C. Cir.) (Prettyman, J.), *cert. denied*, 331 U.S. 837 (1947), approved in *United States* v. *Taylor*, 464 F.2d 240, 242-45 (2 Cir. 1972). That test was met here not only as to Frank and Miller but also as to Hemlock and Hoffer.

III. *The "fictitious name" statute*

The fictitious name statute, originally adopted in 1889, 25 Stat. 873, and codified as part of Chapter 63 of Title 18 relating to Mail Fraud, reads as follows:

> Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of

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[11] Appellate counsel for Hoffer suggests that the decision of trial counsel not to call this defendant was based simply on a belief that, despite the contrary ruling of the trial judge, the Government had not presented a sufficient case to warrant that course. Perhaps so, but the defendant is bound by the strategy that was chosen.

> this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal car, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

It is not entirely clear what advantage the Government derives from invoking this statute, particularly in a mail fraud case where there is a conspiracy charge, since it applies only when the prosecution has established a "purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business." Be that as it may, the Government did invoke it here and, if it did so erroneously, there would have to be a reversal not only of the convictions under Counts 6 and 7 but perhaps also of the conviction on the conspiracy charge, Count 1, since the judge instructed that a finding of a conspiracy to violate § 1342 would warrant a conviction on the conspiracy count.[12]

Defendants say there was no evidence that any participant used or assumed or requested to be addressed by any

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[12] We say "perhaps" because a conviction of conspiracy to violate § 1342 under the circumstances of this case arguably would include a finding of conspiracy to violate § 1341. *United States* v. *Jacobs*, 475 F.2d 270, 282-84 (2 Cir. 1973); *United States* v. *Alsondo*, 486 F.2d 1339, 1347 n. 5 (2 Cir. 1973) (on rehearing).

fictitious, false or assumed name. Not disputing the literal truth of this[13], the Government contends that the statute should not be read so narrowly but should be construed to cover a situation where persons having no substantive interest, *e.g.*, Kay, Miss Comeau, Columbia, Splindian, Hepburn and Miss Neill, are inserted into a fraudulent transaction for the sake of concealing the identities of the true beneficiaries of the scheme, even though the individuals and corporations are using their actual names. This construction seems reasonable. It was essential to the fraud that the purchasers on the second round should not be Frank and Miller, or even corporations in which they appeared to have an interest. In that sense the defendants did utilize an identity other than their own to conceal their role in the fraud.[14] Such meagre case law as exists seems to support the application of §1342 to facts such as these, in result if not in discussion. *See e.g., United States*

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[13] The Government does not urge that defendant Borgman's use of the name Miller satisfies the statute; apparently Borgman had been calling himself Miller for some time and Mrs. Dominguez was in no way deceived by this. It does urge that the jury could properly have found that "Lefkowitz" was not the shadowy individual's real name. We doubt there was sufficient evidence of this.

[14] The fact that the name used by the defendant belongs to a real person has long been held insufficient to avoid the reach of § 1342. It is the defendant's use of a name other than his own to obscure his identity that constitutes the offense. *United States* v. *Etheredge*, 140 F. 376, 380 (N.D. Ala. 1905). Prosecutions for fraudulent misuse of credit cards have typically involved the use of names of real persons. See, *e.g.*, *United States* v. *Bonanno*, 430 F.2d 1060 (2 Cir.), *cert. denied*, 400 U.S. 964 (1970); *United States* v. *Chason*, 451 F.2d 301 (2 Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972); *United States* v. *Madison*, 458 F.2d 974 (2 Cir.), *cert. denied*, 409 U.S. 859 (1972).

v. *Kyle,* 257 F.2d 559 (2 Cir. 1958), *cert. denied,* 358 U.S. 937 (1959); *United States* v. *Baren,* 305 F.2d 527 (2 Cir. 1962); *Atkinson* v. *United States,* 344 F.2d 97 (8 Cir.), *cert. denied,* 382 U.S. 867 (1965); *cf. United States* v. *Ellicott,* 336 F.2d 868 (4 Cir. 1964).

IV. *Alleged receipt of inadmissible hearsay*

Two complaints are made with regard to the receipt of allegedly inadmissible hearsay.

The first, relating to certain statements of Kay to the notary, need not detain us long. Apart from the point that there may well have been sufficient evidence to link Kay with the conspiracy under the standard prescribed in *United States* v. *Geaney,* 417 F.2d 1116, 1119-20 (2 Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970),[15] our attention has not been called to any statement of Kay's that was received to prove the truth of a matter asserted in the statement. Instead, his remarks served only to prove his knowledge of facts otherwise established or to shed light on his several transactions with the notary. See *United States* v. *Annunziato,* 293 F.2d 373, 376-77 (2 Cir.), *cert. denied,* 368 U.S. 919 (1961); *United States* v. *Costello,* 352 F.2d 848, 853-55 (2 Cir. 1965), *rev'd on other grounds sub nom. Marchetti* v. *United States,* 390 U.S. 39 (1968); McCormick,

[15] This is an appropriate place to note and reject the argument that the Government's proof failed because the excess of the amount paid by Planinvest over that received by Dr. Hori and Mtre. Solomon may have gone to Kay, rather than to the defendants. If Kay was a fellow conspirator, that would be immaterial. Moreover, there was ample evidence that the large sums remaining in the Nassau branch of FNCB were accessible to Frank, Hemlock and Hoffer rather than to Kay, and were removed by them.

Evidence § 249 (Cleary ed. 1972). No matter how often appellate courts and commentators seek to explicate the true nature of the rule, the motion that any reference to a conversation constitutes hearsay, inadmissible unless within an exception, dies exceedingly hard.

A more troubling question concerns the admissibility against Hemlock and Hoffer of the admissions by Frank and Miller at their final meeting with Mrs. Dominguez. The serious argument here is not that there was inadequate proof *aliunde* of the conspiratorial relation among the four men but that the admissions were not in furtherance of an on-going conspiracy.[16]

We have little difficulty in holding that despite *Krulewitch* v. *United States*, 336 U.S. 440 (1949), *Lutwak* v. *United States*, 344 U.S. 604 (1953), and *Grunewald* v. *United States*, 353 U.S. 391 (1957), the conspiracy to defraud Mrs. Dominguez was continuing as late as September 24. The basis of *Krulewitch* was "that the central aim of the alleged conspiracy—transportation of the complaining witness to Florida for prostitution—had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her," 336 U.S. at 442; the Court rejected the argument "that even after the central criminal objectives

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[16] The Government claims that no objection was made to the admission of this testimony; the defendants counter that the judge had ruled that he would provisionally admit all declarations of alleged conspirators subject to a subsequent blanket motion to strike evidence the admission of which was not warranted under the conspiracy excepton and that such a motion was made. While we appreciate the judge's desire to expedite the trial, we are not sure of the wisdom of departing so far from the requirement of specific and reasoned objection to a particularly crucial piece of evidence.

of a conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment [from the government] as its sole objective." 336 U.S. at 443. *Lutwak* and *Grunewald* added nothing more, although Mr. Justice Harlan's opinion in the latter is useful for its explication, 353 U.S. at 402:

> Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators.

Here the conspiracy could well be regarded as not simply to perpetrate the two frauds here described. The evidence suggests that the conspirators thought they had a good thing in Mrs. Dominguez and would defraud her further if the opportunity arose. More important, the conspiracy even as to the two parcels was not complete so long as Mrs. Dominguez was threatening to get the money back.

There is more of a problem in holding that the declaration was in *furtherance* of the conspiracy, a requirement to which we have adhered. *United States* v. *Annunziato supra,* 293 F.2d at 380. If Frank and Miller had simply admitted the overpayment, we would see no basis for such a ruling. However, they went beyond this and offered an explanation which they apparently thought with however little basis would turn away Mrs. Dominguez or at least diminish her ire and the consequent zeal of her pursuit. In any event, although no one has made the point, we do not see why the admission of the diversion of Planinvest's funds to an unauthorized purpose was not a declaration against pecuniary interest by a declarant unavailable to testify, see McCormick, Evidence §§ 276, 277, 280 (Cleary ed. 1972).

Appendix A

V. *Receipt of testimony concerning Bahamian bank transactions*

The Government's case rested heavily on the testimony of Latvis, former manager of the FNCB Nassau branch who is no longer with the Bank and his secretray Miss Reilly now employed at its branch in Tarrytown N. Y. Appellants contend that because of the Bahamian Bank Secrecy Act the court should not have permitted Latvis or Miss Reilly to testify about the various banking transactions at the FNCB Nassau branch. The Bahamian Bank Secrecy Act provides under penal sanction, that

> Except for the performance of his duties or the exercise of his functions under this Act or when lawfully required to do so by any court of competent jurisdiction within the Colony or under the provisions of any law, no person shall disclose any information relating to the affairs of a bank or of the customers of a bank which he has acquired in the performance of his duties or the exercise of his functions under this Act.

The district court authorized the submission to a Bahamian court of an International Request for Judicial Assistance, contemplated by the Bahamian Act, for the disclosure of the records here relevant. Justice J. A. Smith granted the request on May 31, 1973, but his order was stayed pending an appeal but not later than June 30. Before that date the trial here was concluded.

We do not read our decisions dealing with the application of bank secrecy laws to American banks whose foreign branches are governed thereby, *First National City Bank* v. *I.R.S.*, 271 F.2d 616 (2 Cir. 1959), *cert. denied,*

361 U.S. 948 (1960); *Application of Chase Manhattan Bank,* 297 F.2d 611 (2 Cir. 1962); *United States* v. *First National City Bank,* 396 F.2d 897 (2 Cir. 1968); and *Trade Development Bank* v. *Continental Ins. Co.,* 469 F.2d 35, 39-42 (2 Cir. 1972), to go as far as appellants urge. In *Application of Chase Manhattan, supra,* the case most favorable to the appellants, we simply declined, on the facts there presented to use the process of our courts to force an American bank doing business in a foreign country to take action in that country which would constitute a crime. It is not at all clear that under the principles normally applied in the interpretation of criminal statutes the revelations by Mr. Latvis and Miss Reilly in New York would constitute a crime under Bahamian law. Even if it would no principle of accommodation requires the United States to seal the lips of American citizens testifying to facts within their knowledge concerning activities of other Americans in a foreign country as part of a scheme to violate American criminal law simply because that country chooses to throw a veil of secrecy around bank accounts except insofar as their courts may see fit to lift it. We thus have no occasion to consider the Government's contention that the balance struck in the cited decisions requires reconsideration favorable to it because of enactment of The Bank Secrecy Act, 84 Stat. 1114.

VI. *The use of an interpreter*

The question of Mrs. Dominguez' need for a Spanish interpreter had been discussed at a pretrial hearing. The Government represented that it would establish such a need at the trial. Counsel for one of the defendants objected on the ground that Mrs. Dominguez was fluent in

English and that permitting her to have the services of an interpreter would give her an undue advantage in cross-examination. The judge refused to conduct an evidentiary hearing on Mrs. Dominguez' proficiency in English saying that in all probability he would permit an interpreter to stand by and allow Mrs. Dominguez to use her when and if needed.

Over objection an interpreter was sworn at the beginning of the trial. After satisfying himself that Mrs. Dominguez spoke and understood English, the judge decided to take her testimony in that language but advised her to communicate with him if she needed a Spanish interpreter. The direct examination was conducted almost entirely in English. However on cross-examination the witness on several occasions resorted to the interpreter without prior authorization from the court. Over repeated objection by defense counsel the interpreter answered roughly a dozen questions for her during her day-long cross-examination.

We are not altogether happy about the manner in which this matter was handled. The reason initially given by the Government for having an interpreter, that Mrs. Dominguez speaks Spanish "nearly 70 per cent of the time," seems to backfire; if the Government meant that she spoke English 30 per cent of the time, this is quite a lot. Its argument that "as early as the fifth page of direct examination, it was clear that an interpreter would be periodically required" is rather disingenuous. The interpreter was there required only to help Mrs. Dominguez explain that a bank account opened by her mother on her attaining 21 was a "savings account." She went on for 40 pages without requiring further assistance. On the second occasion she relied on the interpreter simply to help her

describe Frank and Miller's "assassination" explanation at the final meeting. She then concluded her direct examination without further need of the interpreter's aid. We assume defendants would have raised no objection to the use of an interpreter solely for technical terms or five syllable words. Certainly such limited use of an interpreter would have been perfectly proper. The defendants' point is different. They claim that if Mrs. Dominguez could do that well on direct examination, there was no need for the more extensive reliance on the interpreter that occurred on cross.

The argument is not quite so strong as it seems. Mrs. Dominguez had appeared before the grand jury and had doubtless gone over her testimony with the prosecutor. Her relative familiarity with the lines taken on direct examination almost certainly enhanced her ability to understand the questions and respond in English. The surprise of cross-examination is a different matter. Still we are disturbed by her occasional resort to the interpreter when a cross-examiner seemed to approach at least a minor success. Here again see note 16 the judge may have been the victim of his ground-rule forbidding counsel to state the basis for their objections without special permission; counsel might have suggested such courses as a slackening of speed rephrasing of questions by the interrogator or the court or enforcement of the judge's directive that Mrs. Dominguez request permission to use the interpreter on each occasion when the need arose. On the other hand, the jury observed what was going on and defense counsel were free to comment on it in their summations, as one of them did. Counsel have cited no case where a conviction has been reversed because of the improper use of an interpreter, although, despite *Perovich* v. *United States*,

205 U.S. 86, 91 (1907), there have been some reversals for refusal to appoint one, obviously a stronger case. See 3 Wigmore, Evidence § 811, at 277-78 & n. 2 (Chadbourn rev. 1970); *United States* v. *Desist*, 384 F.2d 889, 901-03 (2 Cir. 1967), *aff'd without discussion of this point*, 394 U.S. 244 (1969); *United States ex rel. Negron* v. *New York*, 434 F.2d 386, 389-90 (2 Cir. 1970); *United States* v. *DiazBerrios*, 441 F.2d 1125, 1127 (2 Cir. 1971). All things considered, we find no abuse of discretion by the judge sufficiently prejudicial to require a reversal.

VII. *The instructions and refusal to instruct concerning the effect of a conviction on Mrs. Dominguez' civil suit*

At the conclusion of his charge to the jury, Judge Pollack asked the parties to submit exceptions to the instructions he had given. After the defendants had raised several objections, he commented, "You know, I am a little disturbed over the fact that you are sitting here with these things that you had for some days." The Government he pointed out, had submitted elaborate requests to charge, and a supplementary request relating to the relationship between a criminal conviction and a subsequent civil suit. He noted that the defendants had neither submitted requests to charge nor objected to any of the Government's requests prior to his delivering the charge. Not surprisingly the judge's instruction on the effect of a conviction on Mrs. Dominguez' civil suit was heavily influenced by the Government's request.

The judge began by pointing out, quite correctly, that "The pendency of a private civil lawsuit referring to the transactions mentioned here is no defense to this indict-

ment" and by explaining the different functions of criminal prosecutions and civil suits. He went on however, to say:

> Thus, a conviction in a criminal action does not support a subsequent civil judgment in a case of this sort based on the same transactions because each of such proceedings has a totally different object. In addition, they are dissimilar in terms of parties, rules and procedures.
>
> Where defendants in a criminal prosecution of this kind are sued in a civil trial based on the same transactions, the two proceedings are completely unrelated, except only in respect of whether the civil matter may bear on the issue of credibility. That is to say, if the defendants are convicted in the criminal action, the plaintiffs in the civil suit will still have to prove their entire case for damages before a new jury or judge and could in no way rely on defendant's prior conviction to sustain their claim.

He later gave a fairly detailed "interest" charge with respect to credibility, instructing the jury as follows:

> In weighing the testimony of the witness, you can consider their relationship to the Government or to the defendant, as the case may be, and any bias or interest in the outcome of the case. . . .
>
> Interest creates a motive for false testimony. The greater the interest, the stronger the motive for false testimony. In appraising credibility you may take that fact into consideration. However, it by no means follows that simply because a person

> has a vital interest in the end result, he or she is not capable of telling a truthful, candid and straightforward story.
>
> It is for you to decide to what extent, if at all, any interest of the witness has affected or shaded the testimony.

When the time came for making objections, trial counsel for Hoffer excepted "to what was the Government's supplementary charge with respect to the civil lawsuit and the language used by the Court." While this alone would have been too general, counsel for Frank amplified it, saying that

> I think that the outcome of the criminal case is definitely a matter that can be related to the civil case in the sense that if there is a conviction, the jury's verdict could be deemed to be res judicata in the civil suit even though you have different parties on the same subject matter and where the evidence would be identical.

After counsel elaborated further on this point, the judge noted that he had given "a very strong interest charge." Counsel conceded this and on that account withdrew "any exception to the statement that the civil suit will be no defense—", at which point the judge interrupted. It may be that if he had not, counsel would also have withdrawn the objection to the remarks that "a conviction in a criminal action does not support a subsequent civil judgment in a case of this sort based on the same transactions," that "the two proceedings are completely unrelated, except only in respect of whether the civil matter may bear on the issue of credibility," and that Mrs. Domniguez "could

in no way rely on defendants' prior conviction" in her civil suit; but we cannot find that any such withdrawal occurred. The issue is academic in any event since counsel for Hemlock then requested that the judge charge, "in connection with the civil suit . . . that the jury may consider the question of motive or interest of such witness or party because she stands to gain something in the event of a conviction in this case." In response to this, the judge gave an additional instruction[17] which does not seem to have added or subtracted anything.

Defendants' claim is that, in a diversity action in the Southern District of New York, the court would be bound to follow New York law on the collateral estoppel effect of a criminal conviction in a subsequent civil suit by a private person. The highest court of New York, they note, has recently held that under modern principles a criminal conviction is conclusive in any subsequent civil action as to any issues necessarily determined against the defendants in the criminal case, *S.T. Grand, Inc.* v. *City of New York,* 32 N.Y.2d 300, 344 N.Y.S.2d 938 (1973) (federal judgment convicting plaintiff corporation and its president of bribing City Water Commissioner precludes relitigation of validity of ensuing contract), and that the quoted instructions were thus in error.

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[17] "Now, I believe I have sufficiently charged you on the issues of interest and motives and the things that you have to keep your eye on and what you are really here to decide, and in an excess of caution I will say to you that there is no doubt that Mrs. Dominguez has a civil suit pending. I think I have sufficiently indicated to you what the relationship is between that suit and this, other than the fact that naturally she is a litigant and has an interest in that civil suit, and you may consider her testimony accordingly."

The Government challenges defendant's legal position.[18] Relying on *Kern* v. *Hettinger*, 303 F.2d 333, 340 (2 Cir. 1962), it argues that the question of the effect of convictions in this case in a civil suit in a federal district court is one of federal law and, implicitly, that it should be decided in the negative.

We do not accept either branch of the Government's argument. *Kern* v. *Hettinger, supra,* held only that whether a dismissal in a diversity action by a federal district court in California was to be read as being with or without prejudice must be determined in accordance with F.R. Civ. P. 41 rather than by the California state rule. Citing *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), the court ruled that in a clash between state law principles and the Federal Rules of Civil Procedure, the Federal Rules would prevail. See *Hanna* v. *Plummer*, 380 U.S. 460 (1965). The *Kern* case would be relevant if, but only if, some competent federal authority had decreed that a federal criminal conviction should not have collateral estoppel effect in private civil litigation. Since we know of no such decree, we see no reason why the district court seized of Mrs. Dominguez' diversity action should not endeavor to reach the same results as would a New York court sitting "a block away". *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945). See *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 539-40 (2 Cir. 1965) *cert. denied*, 382 U.S.

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[18] The Government has not sought to distingush *Grand* on the basis that there collateral estoppel was being used by New York City defensively whereas Mrs. Dominguez would be using it offensively. In view of the New York court's earlier decision in *B. R. De Witt, Inc.* v. *Hall*, 19 N.Y.2d 141, 278 N.Y.S.2d 596 (1967), the failure to raise this point seems to have been well-advised.

983 (1966); *Breeland* v. *Security Insurance Co. of New Haven*, 421 F.2d 918, 921 (5 Cir. 1969).

Even if the question of the effect of a conviction on relitigation of the fraud in Mrs. Dominguez's civil suit were to be determined by federal law, our abandonment of the mutuality requirement in *Zdanok* v. *Glidden Co.*, 327 F.2d 944 (2 Cir.) *cert. denied*, 377 U.S. 934 (1964); see also *United States* v. *Webber*, 396 F.2d 381 (3 Cir. 1968); *James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F.2d 451 (5 Cir.) *cert. denied*, 404 U.S. 940 (1971); *Bernhard* v. *Bank of America National Trust & Savings Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942), now approved by the Supreme Court so far as concerns defensive use of collateral estoppel, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), would lead us to hold that a conviction here will operate as collateral estoppel in favor of Mrs. Dominguez in her civil suit, although neither *Zdanok* nor *Blonder-Tongue* involved the criminal-civil interplay. It is true, as the Government suggested at argument, that such a holding may subject complaining witnesses in federal criminal trials to more severe attacks on credibility than would otherwise be the case. Arguably, and perhaps more seriously, it provides too tempting a reward for overstatement or even perjury. While such fears are not utterly without basis, we think they are overcome by the desirability of a rule that a fact once established, after full and fair trial, beyond a reasonable doubt, should not have to be relitigated in a context where a preponderance of the evidence is all that is required. As the Fifth Circuit noted in *Breeland* v. *Security Insurance Co. of New Haven, supra*, 421 F.2d at 922, citing many cases, in attempting to predict a decision by the Supreme Court of Louisiana, "The number of jurisdictions holding that a criminal conviction precludes litiga-

tion of the same issue in a civil suit is ever increasing." We see no reason why federal courts should not follow the general trend—a trend which they have played a not inconsiderable part in bringing about.

It does not follow, however, that a judge must deliver a lecture on the law of issue preclusion in charging a jury with respect to the credibility of a complaining witness who has instituted a civil suit. A full statement of the conditions on the application of collateral estoppel and the limitations on its scope would be more likely to confuse than to enlighten. It would suffice to say that a conviction could operate to the advantage of the plaintiff in the civil suit, or, as counsel for Hemlock requested, that the witness "stands to gain something in the event of the conviction in this case." In determining whether the charge as given not only was error but requires reversal, instructions like these afford the appropriate benchmark.

While the distance between the benchmark and the instructions that were given was still substantial, we do not think this single slip requires reversal under the principles with respect to errors not of constitutional dimensions laid down in *Kotteakos* v. *United States*, 328 U.S. 750, 761-65 (1946).[19] The judge did not misinform the jury as to the elements of the crimes or as to anything relating to the defendants themselves. His error related

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[19] Although the "harmless error statute construed in *Kotteakos*, § 269 of the Judicial Code, see 328 U.S. at 757, has been replaced by 28 U.S.C. § 2111, the views expressed in *Kotteakos* remain authoritative. See *United States* v. *Kahaner*, 317 F.2d 459, 485 (2 Cir.), *cert. denied*, 375 U.S. 836 (1963); *United States* v. *Birnbaum* 373 F.2d 250 (2 Cir.), *cert. denied*, 389 U.S. 837 (1967); 3 Wright, Federal Practice and Procedure (Criminal) § 853-54 (1969).

only to the degree of discount to be applied in evaluating the testimony of an adverse witness, albeit an important one, with respect to whom he had already given a full "interest" instruction. The jury had surely gotten the idea that Mrs. Dominguez was no longer a friend of the defendants and that she wished them ill. The degree of difference a charge like that sought by Hemlock's attorney would have created in weighing Mrs. Dominguez' credibility, let alone in determining the defendants' guilt, is too small to warrant a reversal. Our conviction "is sure that the error did not influence the jury, or had but very slight effect." 328 U.S. at 764.

Although content to rest decision on that basis, we add a word from which counsel could profit in the future. The course that defense counsel pursued in raising this objection to the court's charge seriously weakens their claim of prejudicial error. While counsel can "protect the record" for appellate review simply by objecting to instructions at the conclusion of the judge's charge, that is a poor way to proceed in a matter such as that here under discussion. The judge might reasonably be reluctant to submit a supplemental instruction or correct what he perceives to be minor inaccuracies in his earlier charge for fear that doing so would draw undue attention to the new instruction, or that the jury might be confused in attempting to determine what was withdrawn and what was left of the original charge. This case provides a good illustration of the dilemma in which the deferral of defense objections on a point raised by the Government's requests to charge can place a trial judge. With the jury ready to retire, he was suddenly forced to make a quick determination on a difficult point of law without the aid of any authority except that cited in the Government's request. Even if he had felt that there was merit in the defendants' point, he

would still have to decide on the spot how much of their suggested charge to adopt and how to deliver the supplemental charge in a manner that would convey its proper weight to the jury. Here, for example, a strong supplemental charge indicating that Mrs. Dominguez had a great deal to gain from the conviction of the defendants might well have suggested to the jury that the judge had had second thoughts about Mrs. Dominguez' credibility and now deemed her testimony likely to have been seriously distorted. If we thought the error more serious than we do, we would have to consider whether defendants should be allowed to secure a retrial because of an error which, though they did not invite, they had failed to take effective measures to prevent.

We have considered the few other points raised by defendants but do not believe them to have sufficient merit to warrant discussion.

The convictions are affirmed.

APPENDIX B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of February one thousand nine hundred and seventy-four.

Present: HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. JAMES L. OAKES,
Circuit Judges.

73-2408
73-2384
73-2425
73-2495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, MAURICE S. HERBERT, and A. ARTHUR KAY, a/k/a Aaron Arthur Klians Kay,
Defendants,

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, STEPHEN BORGMAN, a/k/a STEVE MILLER, a/k/a STEPHEN BERMAN, HARRY HOFFER,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments and order of said District Court be and they hereby are affirmed.

A. Daniel Fusaro,
Clerk.

APPENDIX C

Order of Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 73-2384

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of April, one thousand nine hundred and seventy-four.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. JAMES L. OAKES,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, MAURICE S. HERBERT, and A. ARTHUR KAY, a/k/a Aaron Arthur Klians Kay,

Defendants,

JOHN JOSEPH FRANK, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, HARRY HOFFER, ALFRED J. HEMLOCK,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants (Harry Hoffer and Alfred J. Hemlock).

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO

A. DANIEL FUSARO
Clerk

APPENDIX C

Order of Court of Appeals Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of April, one thousand nine hundred and seventy-four.

Docket No. 73-2384

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, MAURICE S. HERBERT, and A. ARTHUR KAY, a/k/a Aaron Arthur Klians Kay,

Defendants,

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, and STEPHEN BORGMAN, a/k/a Stephen Berman, a/k/a Steve Miller,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants (Alfred J. Hemlock, and Harry Hoffer), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge

APPENDIX D

Statutes Involved

18 U.S.C. §§ 371, 1341, 1342, 1343, 2314

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom

it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 1342. Fictitious name or address

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writing, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or moneys, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever,(with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.